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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD RAY NEWSOME,

Defendant and Appellant.

F072825

(Super. Ct. No. F15905797)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Glenda S. Allen-Hill, Judge.

Lauren E. Dodge, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Tennant Nieto and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Gomes, J. and Peña, J.

Donald Ray Newsome was placed on probation after he pled no contest to domestic abuse. He argues the electronic search condition imposed by the trial court as a condition of probation is unconstitutionally overbroad, and is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*).[1] He also argues the condition of probation prohibiting him from possessing firearms is unconstitutionally vague because it fails to include a requirement that the possession be knowing.

We reject the first constitutional challenge because Newsome failed to object to the condition in the trial court and thereby forfeited the right to argue on appeal the condition is unconstitutional. We reject his argument under *Lent* because the condition is reasonably related to his future criminality. In this case, the trial court issued a criminal protective order prohibiting Newsome from having any contact with the victim. We conclude this condition is reasonably related to ensuring Newsome complies with the protective order. We reject the argument related to the prohibition of firearm possession as the Supreme Court rejected this argument in a recently filed opinion, *People v. Hall* (2017) 2 Cal.5th 494 (*Hall*).

FACTUAL AND PROCEDURAL SUMMARY

The charges arose out of an argument between Newsome and his girlfriend. During the argument, Newsome became upset and pushed the victim, kicked her in the chest and threw her car keys at her, striking her in the face and causing a small scratch. During the confrontation, Newsome displayed metal knuckles in a threatening manner, but never touched the victim with the weapon.

The complaint charged Newsome with inflicting corporal injury to a cohabitant in a dating relationship (Pen. Code, § 273.5, subd. (a)),[2] and possession of metal knuckles

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[1] *Lent* was superseded by statute on other grounds as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-295.

[2] All statutory references are to the Penal Code unless otherwise stated.

(§ 21810). Newsome entered into a plea agreement which required him to plead guilty (or no contest) to the first count, with the second count to be dismissed. Probation would be recommended, with an agreement that if Newsome successfully completed probation, the charges would be reduced to misdemeanors pursuant to section 17, subdivision (b). Newsome entered the plea as agreed, and the trial court placed Newsome on probation.

DISCUSSION

Newsome argues two of the conditions of probation imposed by the trial court are constitutionally invalid. As a preliminary matter, the Attorney General argues the notice of appeal filed by Newsome was invalid, and the appeal must be dismissed.

Notice of Appeal

The notice of appeal filed by Newsome was a handwritten note addressed to the Fresno Superior Court. In this note, Newsome informs the court he would like to appeal the judgment because he felt he was treated unfairly. He stated, in essence, that he was coerced to accept the plea agreement because he was told by defense counsel that if he did not accept the deal, the outcome at trial would be worse. He claimed he was innocent, and requested this court dismiss the charges against him.

Newsome did not apply for or obtain a certificate of probable cause as required by section 1237.5. However, a certificate of probable cause is not required when the appeal is from orders made after the plea was entered that do not challenge the validity of the plea, or if the appeal is from the denial of a motion to suppress that was fully litigated before entry of the plea. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096; Cal. Rules of Court, rule 8.304(b)(4).) Newsome's notice of appeal does not fit into either category.

Accordingly, appellate counsel filed an application asking us to construe the notice of appeal to include the statement that the appeal "is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea."

In opposition to this application, the Attorney General argues the appeal must be dismissed because the notice failed to comply with the requirements of section 1237.5 and California Rules of Court, rule 8.304(b). Rule 8.304(b)(4) addresses the procedure to be followed when the defendant is filing an appeal after entering a plea but does not obtain a certificate of probable cause. This section provides that a certificate of probable cause is not required if the "notice of appeal states that the appeal is based on" the denial of a motion to suppress or arises from grounds that arose after the entry of the plea that do not affect the plea's validity. *People v. Jones* (1995) 10 Cal.4th 1102, 1108-1109 (*Jones*)[3] stated that when a notice of appeal fails to comply with these requirements, the appeal is not operative and will not be heard on the merits.[4] We deferred ruling on Newsome's application until we issued our opinion.

Clearly, Newsome's notice of appeal is defective. Nonetheless, since the parties have fully briefed the issues, we grant Newsome's application to have the notice of appeal construed to contain the required language so that the issues raised may be resolved.

Electronic Search Condition

One of the terms of probation imposed by the trial court required Newsome to "Submit person and property, including financial records, vehicles, computers, handheld electronic and cellular devices, and place of abode/known residence to search and seizure at any time of the day or night by probation officers or any other law enforcement officer, with or without a search warrant, or other process." Newsome argues the requirement that he submit his computer and handheld electronic and cellular devices (the electronic search condition) to search and seizure at any time is invalid for two reasons. First, he

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[3] *Jones* was disapproved on other grounds in *In re Chavez* (2003) 30 Cal.4th 643, 656.

[4] *Jones* construed the predecessor to California Rules of Court, rule 8.304(b).

asserts the condition is constitutionally overbroad in violation of the Fourth Amendment. Second, he asserts the condition does not meet the requirements set forth in *Lent*.

Forfeiture

Defense counsel posed no objection to this condition at the sentencing hearing. The Attorney General argues this failure results in a forfeiture of the issue on appeal. Newsome, anticipating the Attorney General's argument, cites *In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*), for the proposition that a claim that a probation condition is facially overbroad presents a question of law which is preserved for appeal without an objection. The Attorney General responds that *Sheena K.* does not apply to the argument presented by Newsome.

Sheena K. addressed the application of the forfeiture doctrine to a probation condition for which the defendant failed to object in the trial court. At the time, the courts of appeal disagreed on whether the doctrine had any application to terms of probation. The term of probation at issue prohibited the minor from associating with anyone disapproved of by probation. On appeal, the minor argued the term was unconstitutionally vague or overbroad because it did not specify that the minor must *know* which persons were disapproved of by probation.

The Supreme Court began its analysis by observing the forfeiture rule encourages parties to bring errors to the attention of the trial court so they may be immediately corrected. (*Sheena K.*, *supra*, 40 Cal.4th at p. 881.) It also observed the rule applied in sentencing as well as other areas of criminal law. (*Ibid.*) After analyzing the various relevant cases, the Supreme Court concluded,

> "Applying the rule to appellate claims involving discretionary sentencing choices or unreasonable probation conditions is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition that is premised upon the facts and circumstances of the individual case. Generally, application of the forfeiture rule to such claims

> promotes greater procedural efficiency because of the likelihood that the case would have to be remanded to the trial court for resentencing or reconsideration of probation conditions.
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> "In contrast, an appellate claim—amounting to a 'facial challenge'—that phrasing or language of a probation condition is unconstitutionally vague and overbroad because, for example, of the absence of a requirement of knowledge as in the present case, does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court. Consideration and possible modification of a challenged condition of probation, undertaken by the appellate court, may save the time and government resources that otherwise would be expended in attempting to enforce a condition that is invalid as a matter of law." (*Sheena K., supra*, 40 Cal.4th at p. 885.)

The Supreme Court also cautioned that not every constitutional challenge would fit within this exception to the forfeiture rule. "We caution, nonetheless, that our conclusion does not apply in every case in which a probation condition is challenged on a constitutional ground. As stated by the court in [*In re Justin S.* (2001) 93 Cal.App.4th 811], we do not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." [Citation.]' [Citation.] We also emphasize that generally, given a meaningful opportunity, the probationer should object to a perceived facial constitutional flaw at the time a probation condition initially is imposed in order to permit the trial court to consider, and if appropriate in the exercise of its informed judgment, to effect a correction." (*Sheena K., supra*, 40 Cal.4th at p. 889.)

The issue before us, therefore, is whether Newsome's argument presents a facial challenge that does not require scrutiny of individual facts and circumstances, or whether

resolution of the appeal is premised on the facts and circumstances of the case. Resolution of this issue requires review of the precise argument made by Newsome.

The argument begins by demonstrating the broad range of information to which law enforcement would have access as a result of the electronic search condition. However, the argument continues by recognizing the state's intrusion into Newsome's private digital information "must be weighed against the legitimate governmental interest in searching his electronic devices." "To assess the 'closeness of the fit' between the legitimate purpose of the condition and the burden it imposes, it is useful to review those cases that have considered whether a probation or parole condition is sufficiently narrowly tailored to justify the [c]onstitutional infringement." Newsome then discusses *In re Stevens* (2004) 119 Cal.App.4th 1228, *United States v. Lifshitz* (2d Cir. 2004) 369 F.3d 173, *In re J.B.* (2015) 242 Cal.App.4th 749, and *People v. Appleton* (2016) 245 Cal.App.4th 717. Newsome's discussion of these cases included the specific facts of the cases and why the probation conditions were overbroad under those facts. Newsome then argues the trial court failed to explain why it imposed the electronic search condition, and the record did not reveal a legitimate governmental interest protected by the condition. Newsome notes the offense did not involve the use of a computer or cellular phone, the crime to which Newsome pled did not suggest such monitoring was necessary, and Newsome's personal history did not provide any justification for the electronic search condition. Therefore, according to Newsome, the electronic search condition cannot be justified by a compelling state interest.

Newsome also emphasizes the enormous amount of data to which law enforcement would have access to argue the condition was overbroad. He concludes, "Under the circumstances present here, the electronic device search condition bears no relationship to a compelling government interest and thus is unconstitutionally overbroad."

Our summary unequivocally establishes that Newsome's argument is based entirely on the facts and circumstances in this case. It relies extensively on cases Newsome finds factually similar to the circumstances he faces, and cites the particular facts related to him to explain why the condition is overbroad. Therefore, Newsome is not making a facial challenge that would be preserved for appellate review in the absence of an objection. The failure to object precludes consideration of the argument for the first time on appeal. (*Sheena K., supra*, 40 Cal.4th at p. 885.)

For the first time in his reply brief, Newsome argues the failure to object should be excused because the law related to electronic search conditions is unsettled, and is currently pending before the Supreme Court. (See, e.g., *People v. Harris* (2013) 57 Cal.4th 804, 840 [failure to object excusable where law changed dramatically after trial].) We generally do not consider points raised for the first time in a reply brief because it would be unfair to the Attorney General who has no opportunity to respond. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

People v. Lent

Newsome argues the electronic search condition is invalid pursuant to the criteria established in *Lent*. Recognizing that failure to object to the condition in the trial court results in forfeiture of the argument (*Sheena K., supra*, 40 Cal.4th at p. 885), Newsome argues defense counsel was ineffective for failing to do so.

"Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.] [¶] Our review is deferential; we make every effort to avoid

the distorting effects of hindsight and to evaluate counsel's conduct from counsel's perspective at the time. [Citation.] A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] … Nevertheless, deference is not abdication; it cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions." (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

The first step in the analysis is to determine whether defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. In this case, that requires us to determine if the electronic search condition fell within the parameters of *Lent*.

When granting probation, the trial court may "impose and require … reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer …." (§ 1203.1, subd. (j).) "The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof. [Citation.] A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality ….' [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Lent, supra,* 15 Cal.3d at p. 486.)

We review the imposition of any condition of probation for an abuse of discretion. (*People v. Snow* (2012) 205 Cal.App.4th 932, 940.) Reversal is required only if the trial

court's ruling is arbitrary or capricious, or exceeds the bounds of reason. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

Newsome argues the electronic search condition does not meet any of the *Lent* criteria. The Attorney General impliedly concedes the first two criteria are not at issue, i.e., the electronic search condition is not related to the crime of which Newsome was convicted and the use of electronic devices in general is not criminal. The parties differ on whether the electronic search condition is related to future criminality.

Newsome cites several cases as support for his contention that the electronic search condition is not reasonably related to his future criminality. *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*) held that a condition of probation which permitted law enforcement to search her electronics and required the minor to give law enforcement her passwords was not reasonably related to the minor's future criminality. (*Id*. at pp. 909-910.) The appellate court noted the minor was convicted of misdemeanor possession of Ecstasy (Health & Saf. Code, § 11377, subd. (a)), the condition had no relationship to the crime, and there was no connection between the charge and the use of electronic devices. Since there was no evidence that her use of electronic devices showed a predisposition to criminal activity, the appellate court concluded there was no reason to believe the condition would preclude the minor from committing criminal acts in the future. (*Erica R.*, at p. 914.)

The appellate court in *In re J.B.*, *supra*, 242 Cal.App.4th 749 reached the same conclusion. The minor was convicted of petty theft as a result of shoplifting a shirt from a department store. As a condition of probation, the juvenile court required the minor to permit searches of his electronic devices, and provide his passwords to the devices and social media sites. The appellate court concluded the condition must be stricken because

there was no connection between the minor's use of electronic devices and his past or future criminal activity.[5] (*Id*. at pp. 756-757.)

This case is easily distinguishable from those cited by Newsome. As the Attorney General points out, the trial court issued a criminal protective order to protect the victim as part of the sentence. Any contact between Newsome and the victim would be a violation of the order. One obvious method of contact is through social media. Permitting law enforcement to search Newsome's electronic devices is an obvious method of ensuring he obeys the order. Therefore, the trial court did not abuse its discretion when it imposed the electronic search condition because it is reasonably related to Newsome's future criminality.

Our conclusion does not condone general oversight of an individual's activities to monitor for possible criminal conduct. The electronic search condition is necessary to monitor specific criminal conduct, contact with the victim in violation of the criminal protective order. While the record does not contain evidence that Newsome contacted the victim through social media or his electronic devices, it is naïve to suggest that such contact did not occur in this day and age.

Since the electronic search condition was reasonably related to defendant's future criminality, defense counsel's representation of Newsome did not fall below an objective standard of reasonableness when he failed to object to the condition. Accordingly, we reject Newsome's claim that defense counsel was ineffective.

Firearm Prohibition

Newsome argues the probation condition that prohibited him from possessing any dangerous or deadly weapons, including firearms and ammunition, is unconstitutionally vague because it does not contain a knowledge requirement. After his brief was filed, the

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[5] Newsome also cites *People v. Appleton*, *supra*, 245 Cal.App.4th 717. However, the appellate court's analysis focused on whether the condition imposed was overbroad.

Supreme Court issued its opinion in *Hall*, *supra*, 2 Cal.5th 494, which addressed this argument. In *Hall*, the Supreme Court held these conditions of probation include an implicit requirement of knowing possession, and thus are not unconstitutional. Therefore, we reject Newsome's argument.

DISPOSITION

The judgment is affirmed.